

CHAPTER 11

DISCHARGE AND BREACH

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TEACHING APPROACH

Like all relationships, contractual relationships eventually come to an end. This chapter provides a discussion of the ways in which a contract may be brought to an end. We discuss the topic under four general headings, each of which contains sub-topics:

- Discharge by Performance
 - time of performance
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 - tender of performance
- Discharge by Agreement
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- Discharge by Breach
 - types of terms
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It is important to remember, however, that we saw, in previous chapters, that contracts can be brought to an end in other ways as well. For instance, as we saw in Chapter 10, a contract may be rescinded or voided on the basis of such things as fraud.

Given the nature of this chapter, it is impossible to isolate the individual topics from the materials contained in other parts of the text. Students therefore should begin to more clearly see the contractual process as a whole, rather than as a series of discrete steps. They should, for instance, be encouraged to reflect on the fact that consideration generally is necessary not only to the initial formation of a contract, but also to the variation or early discharge of an agreement. There is, in that respect, a very close connection between much of what is said in this chapter and much of what was said in Chapter 8.

Students should also be encouraged to consider, often from a risk management perspective, the range of ways in which an existing contract can be varied or brought to an end. Some means will be more effective or less risky than others. For instance, if there is a possibility that an event may occur which, while not amounting to frustration, will make it more difficult or expensive for a party to perform, then that party should consider including a condition subsequent into the agreement at the outset.

ADDITIONAL TEACHING SUGGESTIONS

Substantial Performance

As a general rule, there is a breach of contract unless a party has performed *precisely* in compliance with the contract. Students therefore might well wonder why a party in breach should be entitled to have a contract discharged on the basis of *substantial performance*. The answer, it seems, stems from the fact that many contracts (especially building contracts) state that no payment shall be made until the task is complete. It would often be unconscionable, however, to allow the recipient of services that substantially comply with the terms of the agreement to refuse all payment simply because the other party tendered performance that was in some trivial or relatively insignificant way incomplete or deficient. Consequently, as a matter of policy, the contract is discharged on the basis of the substantial performance, but the innocent party is entitled to damages that will compensate its loss or allow it to secure alternative performance from someone else.

True Conditions Precedent and Relief for Breach of a Subsidiary Obligation

A true condition precedent that attaches to a contract of sale suspends the parties' duty to perform the primary obligations – *ie* for the purchaser to pay the price and for the vendor to transfer title. Very often, however, as in *Dynamic Transport Ltd v OK Detailing Ltd*, which is explained below in the Case Briefs, even though neither party is immediately required to perform the primary obligations, one or both may be required to immediately perform a subsidiary obligation. In *Dynamic Transport*, the vendor was required to use its best efforts to obtain subdivision approval. In other cases, the purchaser is required to use its best efforts to sell its existing property or to obtain financing for the proposed sale. If the condition is not met, the primary obligations need never be performed. As a result, neither party can be held liable for a breach of those obligations. However, since a

subsidiary obligation must be performed immediately, it can be breached and it can support a right to relief.

Although the quantification of relief is discussed in detail in the next chapter, students already have been exposed to the basic idea that the plaintiff is entitled to have its expectations fulfilled, either directly through specific enforcement or indirectly through monetary damages.

A very difficult question arises with respect to the formulation of relief if a subsidiary obligation under a true condition precedent is breached. In *Dynamic Transport*, the Supreme Court of Canada said that the defendant was required to use its best effort to satisfy the condition by obtaining subdivision approval. If it failed to do so, the Court said, the plaintiff would be entitled to receive the monetary value of the property. That decision is problematic because it may well overcompensate the plaintiff. The subsidiary obligation that arises under a true condition precedent generally only requires a party to use a reasonable effort or its best efforts to satisfy the condition. That is true because the satisfaction of the condition is usually beyond the sole control of the contractual party. It normally is subject to a decision of a third party (eg a province's decision to give subdivision approval, a bank's decision to lend money to the purchaser, a third party's decision to buy the purchaser's existing property). Consequently, even if the party bearing the subsidiary obligation uses its best efforts, there is a chance that the condition will not be satisfied and that the primary obligations will never come into effect. Therefore, if the plaintiff is to be compensated for the defendant's failure to use a reasonable effort under the subsidiary obligation to satisfy the condition, such relief arguably should be reduced or discounted to reflect the possibility of failure even in the event of a reasonable effort.

On the facts of *Dynamic Transport*, that means that even if the defendant refused to apply for subdivision approval, the plaintiff should not necessarily get the full market value of the land. The measure of relief should be discounted by an appropriate degree to reflect the possibility that even if the defendant sought subdivision approval, the province might have refused to grant it.

Right to Discharge for Breach of a Condition

The text explains that if a condition is breach, the innocent party generally has the option of either carrying on with the contract or discharging the contract. (Damages are available in either event.) The text also outlines two situations in which, notwithstanding the general rule, the innocent party will not be able to discharge the agreement: (i) if it has already made the choice to carry on with the agreement, and (ii) if it received a benefit from the party in breach that cannot be returned.

However, there are also situations in which the innocent party must discharge the contract and does not have the option of continuing on with the agreement. While controversial, the leading case is *White and Carter (Councils) Ltd v McGregor* [1962] AC 413 (HL). The parties entered into a contract that required the plaintiff to place advertisements for the defendant's business on trash cans that were to be placed around the city. The

contract was to continue for three years. However, before the plaintiff actually did any work on the project, the defendant repudiated the agreement. The plaintiff nevertheless proceeded to perform the contract and then demanded full payment from the defendant. The defendant refused on the basis that the plaintiff should have mitigated its losses by stopping the project at the outset and simply claiming damages for the loss of expected profits (rather than for the full contract price, which included not only the expected profits, but also the cost of labour and materials). The defendant also argued that the plaintiff's actions were socially wasteful insofar as they involved the expenditure of resources to produce a result that was no longer desired.

The House of Lords held in favour of the plaintiff. The court said that an innocent party is *required* to discharge a contract if: (i) continued performance would require cooperation between the parties, or (ii) it has no substantial and legitimate reason for preferring performance, rather than discharge and damages. On the facts, there was no need for cooperation between the parties because the plaintiff could create the advertisements and place them on the trash bins without the defendant's assistance. As to the second factor, the court somewhat mysteriously said that the plaintiff had a good reason for preferring performance over discharge, but it did not identify that reason. And indeed, the case is commonly criticized on that basis. It would certainly seem that the plaintiff's interests could have been sufficiently protected by monetary relief and that there was no substantial and legitimate reason for requiring actual performance.

Students could be asked to consider, as a matter of social policy, whether the innocent party should have an unfettered right to insist upon performance. In answering that question, they should recognize that, as in *White and Carter*, performance may incur the expenditure of a great deal of money for a purpose that no longer is desired.

DISCUSSION BOXES

Business Decision 11.1

Condition Precedent

1. The agreement involves a contract for sale that is subject to a true condition precedent. It is advantageous from the purchaser's perspective because it provides some assurance that the property will not be sold to a third party while the purchaser attempts to sell an existing property and raise the needed purchase price for Yuri's house. Under a true condition precedent, a contract is immediately created, but performance of the primary obligations is suspended until the condition is satisfied. If the condition is not satisfied within the stipulated period, the sales contract is automatically terminated. Consequently, Yuri is not generally at liberty during the 30 day period to sell his house to anyone else. If he does so, he may be held liable in damages.

2. The agreement is also advantageous from Yuri's perspective. It provides him with some assurance that his house will be purchased at the end of 30 days. Of course, if the condition is not satisfied, the sales contract will be terminated and the sale will not proceed. However, even in that event, Yuri may have a remedy. As the discussion following the box indicates, the purchaser likely has a subsidiary obligation to use best efforts or reasonable efforts to sell his or her existing property. Although the primary

obligations under the sales contract need not be immediately performed, the subsidiary obligation must be. If the purchaser fails to do so, Yuri will be entitled to damages.

You Be the Judge 11.1

Accord and Satisfaction

1. Sudevi did not provide any consideration for Miles' promise to discharge the contract. Consequently, since his promise is merely gratuitous, it cannot be enforced against him. He therefore is entitled to change his mind and insist upon performance or damages for breach. Sudevi might try to argue that she did give consideration for Miles' promise to discharge the contract because she released him from the need to perform his primary obligations under the original agreement. If that was true, the original agreement would be rescinded by mutual agreement, with the support of consideration on either side. That analysis is impossible, however, because Miles' has already fully performed his primary obligations – he has repaired her roof. She therefore cannot provide consideration by suffering the detriment of forgoing her right to insist upon his contractual performance.

2. For the preceding reasons, Miles is not required to honour his promise to discharge the contract.

Ethical Perspective 11.1

Limitation Periods

Question #1 and Question # 2 can be treated together.

From a strictly legal perspective, the tavern owner is no longer required to pay. As a result of a statute of limitation, Estevan is precluded from suing on the debt due to the passage of time. The reasons for that rule are that: (i) that the courts do not want to consider claims if the evidence is old and perhaps unreliable, and (ii) it is unfair to hold the threat of a lawsuit over a person's head for a very long time.

The tavern owner nevertheless may choose to repay the debt for commercial reasons.

- Perhaps the tavern has decided to replace the floors elsewhere in the tavern and Estevan Flooring is the only company in the vicinity who charges reasonable rates. Under such circumstances, it may be in the tavern owner's best interest to clear its debt.
- Estevan Flooring may spread the word to other local contractors that the tavern owner does not pay its debts. In that case, the tavern may have difficulty getting any sort of renovations completed by any contractor.
- More positively, the tavern owner may pay the outstanding bill simply because, from a moral perspective, it is the right thing to do. Estevan was accommodating when the tavern fell on hard times. It therefore seems appropriate for the tavern to reciprocate that good turn by paying the debt, even though it is no longer legally enforceable.

It is also important for students to realize that while the debt currently is unenforceable, Estevan's ability to sue would be revived if the tavern owner acknowledges the outstanding debt.

Students should note that commercial considerations and moral consideration both may lead the tavern owner to the same result: repayment of the debt. The motivation behind each of the considerations, however, is quite different. On the one hand, commercial considerations are generally motivated by profit, whereas the moral considerations are generally motivated by one's conscience.

Business Decision 11.2

Discharging for Breach

1. This question raises a dilemma. The student probably wants to discharge the contract with LJ and arrange an alternative supply of worms from another source. However, the option of discharging the agreement for breach exists only if LJ breached a condition, rather than a warranty. If he did not, but the student nevertheless purports to discharge the agreement, it is the student who will be in breach of a condition and hence be held liable for damages. The situation, in that regard, is therefore closely analogous to *Hong Kong Fir*.

A resolution of the dilemma requires further information to determine whether or not LJ breached a condition. That will be true only if the breach would substantially deprive the student of the expected benefit of the contract. If the breach would not have that effect, then it merely pertained to a warranty. It is possible, however, that the breach could not be conclusively classified as a condition or a warranty at the outset. In that situation, it would be an intermediate term. In that case, the student would enjoy the right of discharge if, in the actual circumstances, he or she was substantially deprived of the expected benefit of the contract.

To distinguish a condition from a warranty (or to distinguish an intermediate term that will be treated as a condition from one that will be treated as a warranty) a court would look at all of the circumstances and ask whether a reasonable person in the parties' position would have expected that a breach should support the right of discharge. In that regard, a court will consider: (i) the proportion of the total performance that is defective, (ii) the likelihood that the breach will be repeated, and (iii) the seriousness of the breach to the innocent party.

2. If the late delivery was caused by LJ's inability to find enough worms, the court is more likely to find a breach of a condition. In that situation, there presumably would be a reasonably good chance that he would be unable to properly perform again in the future. In contrast, if the late delivery was caused by a traffic accident, which is relatively unlikely to happen again, the court is more likely to find a breach of warranty.

3. Late performance on a single occasion would be less significant if the angling competition and the contract were to run for a month, rather than a week. In that situation, the proportion of the defective performance to the contract as a whole would be relatively

much smaller. The effect on the student would also be much less severe. Lost profits for one day out of thirty is far less significant than lost profits for one day out of seven.

REVIEW QUESTIONS

1. The statement is not entirely true. A breach of contract occurs anytime that a party does not perform exactly as required. However, a breach of contract triggers a right of discharge only if the breach substantially deprives the innocent party of the expected benefit of the agreement. That is true if the broken term is either a condition or an intermediate term that is treated as a condition.

As a general rule, time is not of the essence. That means that a party may discharge a contract through performance by acting after the date stipulated by the agreement. The innocent party must acceptance that late performance, but is entitled to damages for any losses that are caused by the lateness.

Notwithstanding the general rule, time is of the essence in certain circumstances. If so, late performance can be refused, and if that happens, the contract will not be discharged by performance. For example, time is of the essence if the parties agree to that fact, either expressly or impliedly. Furthermore, even if time is not initially of the essence, a party can insist upon timely performance by giving reasonable notice that performance must occur by a specific date. Finally, even if the parties do not agree on a specific time or date, the courts will find that performance must occur within a reasonable time, having regard to all of the circumstances, including the subject matter of the contract. A contract dealing with perishable goods or a volatile market may therefore require the parties to act promptly.

Finally, although not discussed in the text until Chapter 13, the *Sale of Goods Act* states that, by default, time of delivery of goods is a condition, whereas time of payment is a warranty.

2. If a contract is discharged, the parties no longer need to perform their primary obligations. However, the contract may still be relevant insofar as it provides for the enforcement of secondary rights, such as the right to damages. The contract may also continue to be important, even after discharge, if it contains a limitation or exclusion clause. Because discharge merely relieves the parties of the need to perform their primary obligations in the future, it continues to exist. The exclusion or limitation clause therefore also continues to have effect.

Discharging a contract is therefore different than rescinding or voiding a contract, as those concepts were explained in Chapters 9 and 10. A contract that is rescinded or voided is wiped out altogether – as if it never was. The contract therefore cannot continue to affect the parties' remedial rights and obligations.

3. The statement is not correct. Once created, a contract generally continues to exist until it is *discharged* in one of the recognized ways. As the Supreme Court of Canada

held in *Jedfro Investments (USA) Ltd v Jacyk Estate*¹ (noted in the text and discussed in a Case Brief that appears below), ignoring a contract does not constitute a recognized means of termination.

If neither party performs, despite accrued obligations, then both are in breach and each party may sue the other for damages. The mere fact that both parties breached the agreement by ignoring it does not terminate the contract.

Finally, while a contract is not be terminated simply because the parties ignored it, the right to sue may be barred by the lapse of time. Statutes of limitation require that a claim for breach of contract be brought within a prescribed period (usually two or six years, depending upon the jurisdiction). That legislation is based on the belief that (1) evidence becomes unreliable after the passage of time, and (2) it is unfair to hold the threat of litigation over the defendant for an intolerably long period. However, even if a limitation period does lapse, the contract itself usually is not thereby terminated or eliminated. The statute merely precludes a contractual party from taking action on the agreement.

4. The phrase “tender of payment” refers to the process by which a contractual debt may be discharged by the payment of money. Payment may take various forms, such as cheque or credit card. Unless the contract says otherwise, however, the creditor has the right (seldom enforced) to insist upon the payment of cash (*ie* notes and coins). Cash payment is known as *legal tender*.

The *Currency Act*² is a federal statute that governs certain aspects of cash. The legislation does not place any restrictions upon the use of notes in the payment of debts. Section 8 of the Act, however, states that legal tender is restricted to certain sums when payment is made with coins: \$40 in two-nies, \$25 in loonies, \$10 in quarters, \$10 in dimes, \$5 in nickels, and 25¢ in pennies. The purpose of that provision is plain. Parliament believed, quite sensibly, that a disgruntled debtor should not be able to compel a creditor to accept unreasonably large numbers of coins. Notes are easily handled. Coins, in contrast, soon become a cumbersome nuisance.

5. “Cash is dangerous for the same reason that it is useful” Within the context of tender of payment, the meaning of the quotation is clear.

The phrase “tender of payment” refers to the process by which a party offers money in discharge of a contractual debt. The word “money” often is used loosely to refer not only to cash (*ie* notes and coins, such as \$5 bills and 25¢ pieces), but also to other forms of payment, such as cheques, credit cards, and debit cards.

Cash is the simplest way to discharge a contractual obligation. In contrast to other forms of payment, it does not merely provide a means to an end — it is the end in itself. Other forms of payment provide access to cash; cash, in contrast *is* cash. Compared with other

¹ (2007) 289 DLR (4th) 385 (SCC).

² RSC 1985, c C-52, s 8 (Can).

forms of payment, cash therefore has the benefit of being absolute. Its recipient has nothing more to do in order to realize its value. Furthermore, title or ownership of money is most easily passed from one person to the next. Every time that cash is used to purchase goods or services from an honest vendor, prior property interests in the cash are extinguished and the vendor — as a *bona fide* purchaser for value — acquires clean title. Unless the circumstances surrounding the sale are suspicious in themselves, the vendor does not have to worry that the money might be stolen. It is precisely that ability to move easily through the marketplace that makes cash so valuable and desirable.

Precisely the same factors, however, make cash dangerous. If lost or stolen, cheques and credit cards can be cancelled and replaced. The value that they represent remains available for use. The same is not true if cash is lost or stolen. The finder or thief may be sued, but they usually cannot be identified. Furthermore, once the cash is used to buy goods or services, the honest vendor (as a *bona fide* purchaser for value) acquires good title to the notes and coins, and cannot be sued. Finally, unlike other assets, including other forms of payment, money is fungible. Although each note bears a unique serial number, that data seldom is known or used. Almost always, one note or coin is exactly the same as the next. As a result, it is usually impossible for lost or stolen cash to be identified in another person's hands.

6. A *debit card* is a plastic card that allows a person to debit, or withdraw, funds from a bank account. The key feature, of course, is that while a debit card can be used at the bank where the account is held, it usually is used at some distant location, such as a store. By swiping the card through a device and typing in a secret personal identification number (PIN), the account holder electronically directs the bank to transfer funds to the merchant. Upon receiving that message, the bank either authorizes or refuses the customer's request, and immediately sends a return message to the merchant. The actual transfer of funds occurs a short time later through the *clearing and settlement system*. At the end of each day, all of the information entered into the Interac system is compared and then funds are added or subtracted from each participant's bank account.

Like a payment by cash, a payment by debit card is *final*. Once a bank authorizes or refuses payment, the system no longer plays any role in the transaction that occurs between the merchant and the debit cardholder. Any dispute that arises between the other parties (because, for example, the cardholder is unhappy with the goods or services that the merchant provided) must be resolved independently of the debit card system. The cardholder cannot, for instance, *revoke* or cancel the request for payment.

Although the rules are not yet entirely clear, the courts have begun to explain the parties' rights and liabilities if a person's debit card is used by a thief to buy goods or services. The outcome in any given case depends upon the circumstances, including the terms of the contract that was created between the cardholder and the bank. As a general rule, however, the cardholder is liable if the cardholder is to blame. That is true, for instance, if the cardholder carelessly keeps the card and a record of the PIN number in the same wallet or desk drawer. Cardholders are also responsible if they fail to promptly report the loss or theft of the card to the bank. In contrast, the bank must bear the loss if the

cardholder is not to blame for the unauthorized use. That is true, for instance, if the cardholder was forced at knife-point to give up the card and the PIN number.

7. The basic difference between a debit card and a credit card is revealed by the names of the two devices.

The word “debit” refers to the process by which the value held in a bank account is reduced. An account is “debited” when funds are withdrawn from it. A debit card accordingly operates by allowing the cardholder to pay for goods or services by electronically withdrawing funds from the cardholder’s own account and transferring them into the vendor’s account. Like a cash payment, a debit card payment is final. Assuming that the debit request is authorized at the time of purchase by the bank, the bank no longer plays any role in the transaction. Its role came to an end when it honoured the cardholder’s request, transferred funds to the vendor, and debited the cardholder’s account.

The word “credit” refers, in this instance, to a loan of money in exchange for a promise of payment. A credit card accordingly works by effectively allowing the cardholder to borrow money from the credit card company (*eg* VISA or MasterCard) and automatically using the borrowed funds to pay a vendor for goods or services. Having loaned the money to the cardholder, the credit card company subsequently sends a monthly bill to the cardholder under which it seeks repayment of the principal, as well as payment of interest.

8. A condition precedent is a contractual term that states that a contract will come into existence only if and when a certain event occurs. Like a condition subsequent, a condition precedent operates on its own and does not have to be exercised by either party to be effective.

A condition subsequent is a contractual term that states that the contract will be terminated if a certain event occurs. A condition subsequent operates on its own and does not have to be exercised by either party in order to be effective. Under a condition subsequent, a contract may be automatically discharged as soon as the relevant event occurs.

9. The concept of an *entire contract* is important in the context of discharge by performance. Despite the general rule requiring a party to perform exactly as promised, the obligation to fulfill the primary obligations may be discharged by substantial performance (*ie* performance of almost all of the contractual obligations). The doctrine of substantial performance is not applicable, however, under an entire contract. An entire contract is one in which a party has no right to payment unless and until it performs in full. That may be true even if a contract *could* be broken into installments. Because the concept of an entire contract has the potential for hardship (*ie* by denying *any* payment to a party that has fulfilled *virtually all* of its obligations), the courts lean away from such a finding. An entire contract will be recognized only if it clearly was intended by the parties (on the objective, reasonable person test).

10. Rescission occurs when parties agree to bring to an end a contract that is executory on both sides (*ie* that contains outstanding primary obligations for both parties). In that situation, there is no problem with consideration. The mutual agreement to terminate the contract is enforceable because each party has given consideration insofar as each party has agreed to release the other from the need to perform an outstanding obligation. Release occurs when the parties agree under seal to terminate a contract. Once again, there is no problem with consideration because, as discussed in Chapter 8, a seal is a sufficient proxy for consideration. The agreement to terminate therefore is enforceable. Finally, an accord and satisfaction occurs when party A gives up a right to demand performance by party B. In that situation, A may have already fully executed its obligations under the contract. Consequently, its promise to forgo its rights cannot be supported by B's promise to likewise forgo its rights under the contract. (B cannot forgo rights that no longer exist. Performance of an obligation can only be demanded *before* the obligation has been performed.) Consequently, B must provide some new form of consideration in order to make enforceable A's promise to forgo its rights. If so, there is an accord and satisfaction. A's promise to forgo its rights under the original agreement is the "accord." B's new consideration is the "satisfaction." In essence, the parties have created a new contract to vary the old one.

11. Novation is a process in which one contract is discharged and replaced with another. There are two possibilities.

- *Two-Party Novation* Novation may allow the parties to a contract to maintain their agreement while substantially altering its terms. For example, a complicated agreement governing the sale of a specific ship may be altered so as to pertain to a different vessel.
- *Three-Party Novation* novation more commonly is used to allow a contract to continue in existence, despite a substitution of one party. For example, a complex mortgage agreement between one person and a bank may be altered so as to maintain precisely the same rights and obligations between the bank and a new person.

12. Depending upon the circumstances, the word "rescission" may refer to two very different contractual concepts.

- *Agreement to Discharge* In the context of the current chapter, "rescission" occurs when contractual parties agree to bring their agreement to an end. The new agreement (to end the contract) is enforceable because each party provides consideration by giving up the right to insist upon performance of the original agreement. In that instance, the parties concede that a contract had existed, but they also agree that the primary obligations no longer need be performed.
- *Termination for Improper Inducement* In Chapter 9, "rescission" referred to a process by which a party terminates a contract on the grounds that it was improperly induced (*eg* through misrepresentation, undue influence, or duress). In that instance, the contract retroactively is wiped away *ab initio*. The contract is treated as if it never existed.

13. In many situations there is no sure way of distinguishing between conditions, warranties, and intermediate terms. Provided that the parties have not stipulated whether the breach of a certain term will or will not support a right of discharge, and provided that a governing statute has not classified a particular term, the courts use an objective test to distinguish between conditions, warranties, and intermediate terms. The test asks whether the parties, as reasonable people, would have intended that the breach that occurred should allow the innocent party to bring the contract to an end. The judge will be influenced by all of the circumstances of the case, including: (i) the portion of the total performance that is defective, (ii) the likelihood that the breach will be repeated in the future, and (iii) the seriousness of the breach to the innocent party.

14. A term is a condition if the innocent party would be substantially deprived of the expected benefit of the contract in the event of breach. Because it would be unfair to require a party to carry on with the performance of an agreement if it has already been substantially deprived of the expected benefit, the innocent party generally has an option. It can either choose to carry on with the performance of the agreement or it can choose to discharge the agreement. That option is lost, however: (i) once the innocent party has made its choice, or (ii) if the innocent party received a benefit from the party in breach that cannot be returned. In any event, the innocent party can claim damages for the losses that it suffers as a result of the breach.

15. A term is a warranty if the innocent party would not be substantially deprived of the expected benefit of the contract in the event of breach. Given the relatively insignificant nature of that type of breach, it is fair to require the innocent party to carry on with the contract. The innocent party can, however, claim damages for any losses that it suffered as a result of the breach.

16. Sometimes it is not possible to determine, at the time a contract is formed, whether a particular term is a condition or a warranty. To avoid the difficulties that arise in that sort of situation, the courts have recognized a third type of term called an intermediate term. The breach of an intermediate term will support the option of discharge if, on the facts, the innocent party is deprived of the essence of what it expected to receive under the agreement. In that case, the innocent party can choose to either discharge the contract and claim damages or carry on with the contract and claim damages. In contrast, if the breach, on the facts, did not substantially deprive the innocent party of the expected benefit of the contract, it does not have the option of discharge. It must be content with a claim for damages.

17. Anticipatory breach occurs when a party indicates in advance, by words or conduct, that it does not intend to fulfill an obligation when it falls due under a contract. An anticipatory breach therefore differs from a regular breach because the wrongdoer has not yet rendered defective or late performance; it has merely indicated that it will do so in the future. In other respects, however, an anticipatory breach is similar to a regular breach. For instance, depending upon the nature of the term and the nature of the breach, it may or may not support the right of discharge, along with the right to damages.

18. A breach will arise from self-induced impossibility if a party, through its own fault, makes the contract impossible to perform. The difference between that situation and one involving frustration is that a contract is discharged for frustration if, through no fault of either party, it becomes impossible to perform.

19. Unlike the situation that occurs when a contract is rescinded or voided, a contract continues to exist for some purposes if a contract is discharged for breach of a condition. The parties are merely relieved of the need to perform their primary obligations in the future. The agreement does, however, continue to exist for the purposes of contractual liability. It may, for instance, provide for liquidated damages or it may limit or eliminate damages through a limitation or exclusion clause.

20. The right to discharge may be lost even if there has been a breach of condition: (i) if the innocent party chooses to continue on with the agreement, or (ii) if the party in breach provided a benefit that the innocent party cannot return. Under the latter situation, the innocent party must perform its own obligations and claim damages for its losses as a result of the breach.

CASES AND PROBLEMS

1. This is a relatively difficult question. It requires students to think very clearly about the precise nature of breach of contract.

A contractual party is strictly liable for performance of its obligations. In this instance, CDBI breached the contract by terminating Jane's employment, on one month's notice, after 12 months of service. The contract was set to run for 36 months. CDBI was entitled to terminate the contract early in two circumstances, but neither circumstance arose on the facts. (1) Since Jane had not actually committed any wrongful act, CDBI was not entitled to terminate her immediately. (2) Since the contract had not yet reached the 18 month point, CDBI was not entitled to terminate the agreement on one month's notice.

In *Hamilton v Open Window Bakery Inc.*,³ the Supreme Court of Canada held that while a contractual party must strictly perform its obligations, it is entitled to perform in the least burdensome way, as long as its performance satisfies the terms of the agreement.

Since the parties' contract was set to run for three years, Jane likely would argue that she is entitled to damages representing 23 months of lost income. (The term of the contract was 36 months; CDBI actually paid for 13 months of service; Jane therefore claims she is entitled to the difference of 23 months.) A court, however, would limit damages to damages for 6 months of lost income. CDBI was entitled to perform in the least burdensome manner. Regardless of any breach, the company had the right to terminate the contract, on one month's notice, after 18 months. Damages therefore should be calculated on the basis of 6 months. (CDBI paid Jane for 13 months; CDBI could bring the contract to an end after 19 months; Jane therefore has a right to damages representing the difference of 6 months.)

³ (2004) 235 DLR (4th) 193 (SCC).

[Based on *Hamilton v Open Window Bakery Inc* (2004) 235 DLR (4th) 193 (SCC).]

2. The crucial question is whether Tadpole sold the warehouse to Janhelene within the exclusive listing period, or whether the sale occurred subsequently. The answer to that question involves the occasionally confusing concept of a “condition precedent.” A condition precedent may work in one of two ways. First, the parties may contemplate that they will enter into a contract if and when a certain condition is satisfied. Until that happens, the contract in question does not exist. Second, the parties may agree to create a contract, but to postpone its performance until such time as a certain condition is satisfied. In that situation, the contract comes into existence immediately. If the condition is met, then they must perform their (primary) obligations. If not, then the contract is discharged.

The effect of a “condition precedent” in any particular instance depends upon the parties’ intention. In this case, it is conceivable that Tadpole and Janhelene intended to use the first type of condition precedent. If that is true, then the sale did not occur until *after* the exclusive listing period had expired, and as a result, Bentley is *not* entitled to receive a commission. It is far more likely, however, that Tadpole and Janhelene intended to use the type of condition precedent. That is generally true in this sort of situation. If so, then the sale contract *was* created within the exclusive listing period when Tadpole and Janhelene signed their agreement. It is irrelevant that their obligations to perform that sale contract were postponed until such time as Janhelene arranged financing. Consequently, Bentley *is* entitled to receive a sales commission from Tadpole.

Bentley did a poor job of drafting its agency agreement with Tadpole. It should have insisted that a commission was payable as long as it identified the eventual purchaser within the exclusive listing period. Such a provision, which is standard in agency agreements, protects the agent from the possibility that the owner may wait until the listing period has expired before creating a contract with a purchaser that the agent had introduced.

3. Dennis is correct that the contract no longer exists because it was discharged through rescission. Since the contract was executory on both sides (that is, neither party had performed its obligation under the contract) Dennis and Carmen were able to agree to bring their contract to an end. Their new agreement to rescind the contract is enforceable because it is supported by consideration on both sides. Each party suffered a detriment by giving up the right to insist upon performance of the original contract. Consequently, Carmen can no longer force Dennis to pay her \$10 000 in exchange for her motorcycle.

4. Pendulum is not entitled to have the contract discharged for \$35 000. First, the parties cannot agree to rescind the contract because Rabby has executed all of its obligations under the agreement. Since Rabby has performed, Pendulum cannot suffer a detriment by giving up the right to insist on performance. Rescission therefore is impossible.

Second, Pendulum may argue that Rabby waived its right to the full \$50 000. Rabby's initial agreement to accept \$35 000 may be construed as clear evidence that it intended to waive its right to \$50 000. However, there is no evidence that Pendulum relied on Rabby's statement. In any event, Rabby would be entitled to retract its own waiver by giving reasonable notice, as long as the effect of the retraction was not unfair to Pendulum. Once again, the facts do not suggest that retraction of any possible waiver would be unfair to Pendulum.

Consequently, in order to discharge the original agreement, Pendulum must have provided accord and satisfaction – that is, a new benefit, which might include a set of encyclopedias. Alternatively, Pendulum would have been entitled to have the contract discharged if the parties had entered a release, whereby Rabby promised under seal to accept the \$35 000. As discussed in Chapter 8, a seal is a sufficient proxy for consideration.

5. The facts raise several issues related to the possibility of discharge by performance.

- *Strict Liability* Liability for non-performance of a contractual obligation is strict. A party must perform exactly as promised. Any deviation or shortcoming will constitute a breach of contract.
- *Discharge by Performance* It follows that a contract usually is discharged by performance. Once a party has fully performed as promised, the contract is discharged, in the sense that there no longer are any outstanding primary obligations.
- *Substantial Performance* Nevertheless, as a concession to practical reality, a contract sometimes may be discharged by substantial performance. That *prima facie* appears to be true in this instance. Although he did not varnish the tea chests, Rooibos performed all of his other obligations. Judging from the fact that the market value of varnishing alone is only \$500, as against a total contract price of \$25 000, he presumably has substantially performed.
- *Entire Contract* The doctrine of substantial performance does not apply, however, under an entire contract (*ie* a contract in which the parties agreed that there would be no right to payment unless and until full performance was rendered). However, while the parties *could have* created an entire contract, there is no evidence to indicate that they actually did so. The courts, furthermore, lean away from finding an entire contract.
- *Damages* Assuming that the contract is discharged for substantial performance, Rooibos is relieved of any need to perform further. The company, however, is entitled to reduce the contract price to reflect the shortfall in performance. As a general rule, the innocent party can deduct the cost of receiving substitute performance. The general rule, however, is confined to *reasonable* substitutes. The company paid Grey \$2500 for a service with a market value of only \$500. It therefore is entitled to deduct only the lesser amount.
- *Conclusion* Rooibos is entitled to \$25 000, but the Darjeeling Tea Company is entitled to reduce that price by \$500.

6. This case involves several issues dealing with breach and discharge. The end result is that the defendant is liable to the plaintiffs.

Liability for performance of a contract is strict. If the defendant does not perform precisely as promised, then the plaintiff is entitled to sue for breach and it is irrelevant that the defendant used its best efforts and honestly tried to fulfill his undertakings.

A breach may be classified as going to a *condition* or a *warranty*. A condition is an important term which, if breached, would substantially deprive the plaintiff of the expected benefit of the agreement. In that event, the plaintiff has the option of discharging the agreement. A warranty is a less important term which, if breached, would *not* substantially deprive the plaintiff of the expected benefit of the agreement. In that event, the plaintiff is entitled to damages only (the contract cannot be discharged).

In this instance, the defendant clearly is in breach. Given the importance of the outdoor facilities and the plaintiffs' stated desire to have use of the glass canopy and waterfall, the defendant's failure to install those items likely constituted a breach of a condition. In any event, the defendant's statement that the contract was impossible to perform constituted an *anticipatory breach*. An unwillingness to perform at all obviously is a breach that goes to the very heart of the agreement. Under an anticipatory breach, the innocent party need not wait until the time to perform has arrived. The plaintiffs were entitled to discharge the agreement immediately.

Once the defendant breached a condition, the plaintiffs were entitled to discharge. Their option was theirs — not his. Moreover, once the plaintiffs discharged for breach, it was not possible for the defendant to resurrect the agreement by saying that he would perform after all. As Belobaba J explained, the defendant's "change of heart was too late."

Finally, although the defendant said that the contract was "impossible to perform," the facts do not disclose a case of *frustration*. Performance was not impossible — it merely was more expensive than the defendant would have preferred. It is irrelevant that the defendant would have lost a great deal of money by adhering to the agreement. Furthermore, a frustrating event cannot be self-induced. In this instance, the defendant (by means of its manager) was to blame for the problems that arose.

Having established the defendant's breach, the plaintiffs are entitled to compensatory damages. Looking ahead to the next chapter, the defendant would be responsible, at a minimum, to pay for the plaintiffs' additional expenses (*eg* re-sending invitations with directions to the new facility), as well as the difference between the cost of the replacement facility and the contract price (*ie* \$18 000 - \$14 000 = \$4000).

[Based on *Jamshidi v 888517 Ontario Ltd* (Unreported 19 Oct 2009, Ont SCJ).]

7. The crucial issue in this case concerns the classification of the contractual term regarding Omar's health. Because the parties did not expressly address that issue, a court

would have to interpret the contract and the surrounding circumstances in order to determine whether the term was a condition or a warranty or an intermediate term.

- A condition is a term which, if breached, will deprive the innocent party of substantially the whole benefit of the contract. If a condition is breached, the plaintiff has an option. She may affirm the contract and simply claim compensatory damages for her loss. Alternatively, she may discharge the contract for breach and claim compensatory damages for her loss.
- A warranty is a term which, if breached, will not substantially deprive the innocent party of the whole benefit of the contract. A breach of warranty does not entitle the plaintiff to discharge the contract. She can only claim compensatory damages for her loss.
- An intermediate term is a term which, if breached, may or may not deprive the innocent party of substantially the whole benefit of the contract, depending upon the circumstances, including the manner and nature of the breach. If the effect of the breach is to deprive the innocent party of substantially the whole benefit of the contract, then the term will be treated as a condition. If the effect of the breach is not to deprive the innocent party of substantially the whole benefit of the contract, then the term will be treated as a warranty.

The relevant term in this case would likely be considered an intermediate term. A horse may be unhealthy in a variety of ways. Some would deprive the purchaser of substantially the whole benefit of the contract. Others would not. Indeed, cribbing may affect a horse's health in a variety of way; some would deprive the owner of substantially the whole benefit of the contract, others would not.

The facts indicated that while Omar's cribbing habit certainly required treatment, the cribbing collar effectively addressed the problem. Moreover, the facts indicate that the bucking problem did not fall within the terms of the contract. Consequently, the intermediate term would be treated as a warranty. Debbie could claim compensatory damages, but she would not be entitled to discharge the contract on the basis of the breach. In the case upon which this question is based, the court said that while the horse could be ridden, no reasonable person would not pay "top dollar" for an animal affected by cribbing. Under normal conditions, the value of a horse with cribbing is reduced by 50 percent. The judge therefore awarded damages of \$1500 against the purchase price of \$3000.

[Based on *Krawchuk v Ulrychova* (1996) 40 Alta LR (3d) 196 (Alta Prov Ct).]

8. This question gives students another opportunity to consider the importance of distinguishing between conditions, warranties, and intermediate terms. If the parties have not expressly stipulated the effect of the breach of a certain term (as is the case here), or if a governing statute has not classified the term, a judge must decide the intention of the parties by examining all of the circumstances. In this case, the judge would ask whether Bettini and the Opera Company, as reasonable parties, would have intended that the breach that occurred should allow the Opera Company to discharge the contract. The judge will consider a number of factors, including: (i) the portion of the total performance

that is defective, (ii) the likelihood that the breach will be repeated in the future where the contract contemplates performance by installments, and (iii) the seriousness of the breach to the innocent party.

Bettini's late arrival for his first scheduled performance focuses on the first factor. Since 23 performances remain, it would be premature to claim that the Opera Company had been substantially deprived of its expected benefit under the contract. For that reason, the Opera Company probably would not be entitled to discharge the contract.

In order to answer whether the outcome would be the same if Bettini had arrived as scheduled for the first ten performances, but not the eleventh, students probably require further information. These facts focus on the second factor: the likelihood that the breach would be repeated in the future. Since just over half of the contract remains to be performed, it is difficult to say with certainty whether or not the breach is likely to be repeated in the future. On the one hand, Bettini had arrived promptly up to this point. On the other hand, however, he may have decided that he no longer requires three days of rehearsal and that he would arrive only one day early from now on. While the answer is not totally clear on the facts, it seems more likely that the Opera Company would not be entitled to discharge the contract under these circumstances.

And finally, the answer may or may not be the same if Bettini was a seasoned professional. Certainly, if he were a novice, the seriousness of the breach would be more pronounced. It is also necessary to consider the possibility that the three day rehearsal was not for Bettini's benefit at all, but rather for the musicians. In that case, the breach may still have been serious from the Opera Company's perspective.

In any event, this question emphasizes, from a risk management perspective, the importance of seeking legal counsel in order to avoid the difficulties surrounding the classification of terms. It is important for business people to note once again that even experienced lawyers may not be able to predict how a judge will interpret the case.

9. Whether or not Ivan breached his contract with Poe depends on when this issue arises. The contract between Ivan and Poe was executory: neither party had performed its obligations under the agreement. Ivan had not submitted a manuscript and Poe had not paid the \$5000. Under those circumstances, the parties could have agreed to discharge the contract through rescission. The agreement to rescind can be either express or implied, but Ivan did not receive any response from Poe. As we know from Chapter 7, silence, by itself, is not acceptance. Moreover, the parties did not sign a release which would have discharged the agreement without fresh consideration. It does not appear, then, that Ivan was relieved of his contractual obligations to Poe.

Ivan's negotiations with Christie occurred before the 18 month time limit under the contract had expired. That means that Ivan still has approximately five months to submit a manuscript to Poe. Consequently, unless there was an additional term in the contract that stipulated that the first book Ivan wrote must be submitted to Poe, it does not appear that Ivan breached the contract.

Assuming, however, that Ivan failed to submit a manuscript within the terms of the agreement, he would have breached a condition of the contract. That is to say, Ivan substantially deprived Poe of its expected benefit under the agreement. In that case Poe would be entitled to seek relief from Ivan.

10. The facts raise the difference between a “condition precedent” and a “true condition precedent.” Although the terms sometimes are reversed in practice, the text explained them in the following terms: A “condition precedent” is a provision that exists *within* an *existing* contract that suspends performance of the primary obligations pending satisfaction of a particular event. A “true condition precedent” is a requirement that must be satisfied before any contract comes into existence.

The essential question consequently is whether (1) the parties immediately created a contract, but agreed that it would not be performed unless the sale was legal, or (2) contemplated creating a contract in the future if the sale agreement would be legal.

The answer depends, as always, on the parties’ intention, as objectively determined by the reasonable person. In the context of land sales, the courts usually construe a condition as falling within the first category. In the circumstances of this case, however, the parties would not have wanted to violate the statute by creating an illegal contract. A court therefore probably would conclude that the condition was a true condition precedent. As such, no contract ever existed and the parties have not committed a crime.

11. Gerry and Harlan’s original contract required each to perform services for the other. The main issue in this question is whether or not that original contract was terminated or discharged. There are several possibilities.

- Gerry and Harlan did not rescind their original agreement. The original contract had already been executed from Gerry’s perspective. Consequently, Harlan could not give fresh consideration under the agreement to rescind by releasing Gerry from the need to perform the original contract. And in the absence of consideration from Harlan, Gerry’s promise to discharge the original contract is unenforceable.
- The parties did not enter into a formal release under seal. Had that been the case, Harlan would have been relieved of his obligations without having to provide fresh consideration.
- Harlan also made an attempt to discharge the original contract by accord and satisfaction. Once again, however, Gerry did not agree to accept the new benefit (the fertilizer) that would have provided the needed consideration.
- Gerry also rejected Harlan’s offer to vary the terms of the existing contract. Instead of their original agreement to exchange mutual performance, Harlan suggested that they alter the agreement so that Gerry’s performance was exchanged for Harlan’s payment.
- Gerry would not agree to novation of the original agreement, whereby Harlan’s son Jeb would replace him as a party to the original agreement.

The question remains as to whether or not Gerry waived his right to insist on contractual performance. In this case, an argument could be made which shows that Gerry's refusal to accept any of Harlan's proposals implies that Gerry intended to waive his rights. That argument, however, probably would not succeed because Harlan would have difficulty proving that he relied on the statement. Furthermore, if Gerry did indeed waive his rights, his statement that he planned to take an extra long vacation probably amounted to reasonable notice that he intended to retract his waiver.

Even though the arrangement was not discharged by agreement or by waiver, it probably was discharged by operation of law. According to the *Statute of Limitations*, Gerry would normally be prohibited from suing Harlan because seven years had passed since Harlan was required to perform his obligations. Significantly, however, Gerry's right to sue was probably revived when Harlan acknowledged his indebtedness and agreed to work one extra week. It is for that reason that Gerry would probably be successful in court.

12. The better analysis of the situation may be Kirk's suggestion that there was a novation of the original agreement, which involved a substitution of parties, rather than obligations. There are several points in support of that view.

- Ruth acquired the consent of all parties to the new arrangement. That is to say, all of the affected parties agreed that Kirk would "replace" Ruth.
- Since Kirk was not present when the contract was originally created, he was not afforded the opportunity to bargain for the wages that he would receive or the amount of responsibility that he would assume. That may suggest that he adopted the rights and liabilities to which Ruth originally agreed.

If novation did occur, Kirk should be entitled to more money. First, if he adopted the same rights as Ruth, he should be entitled to the same wage that she received. The Van de Laer's therefore should pay him the additional \$50 per week, plus any back pay they owe him. Second, if Kirk adopted the same obligations as Ruth, then the added responsibility of the pool maintenance is a variation of the original agreement. Variation requires the consent of both parties, which, presumably, it received. However, variation also requires that both parties provide fresh consideration. In this case, Kirk's consideration was his performance. For their part, the Van de Laer's offered nothing in exchange. For that reason, Kirk is also entitled to more money as consideration for the pool maintenance. (He could likely establish a contract in support of his claim to that additional payment because the Van de Laer's had requested his work in circumstances that implied a promise to pay. However, as discussed in Chapter 8, even if a contract did not arise, Kirk would be entitled to the reasonable value of this services by way of restitution under a claim in unjust enrichment.)

It is, nevertheless, possible that a court would accept the Van De Laer's interpretation of the situation. In that case, there would be no novation. Instead, the original agreement between Ruth and the Van de Laer's would have been rescinded and a completely new agreement between the Van de Laer's and Kirk would have been created. Under that new contract, however, the parties did not negotiate a price for Kirk's services. The Van de Laer's therefore would be required to pay a "reasonable price." Their earlier contract with

Ruth might well provide the best evidence of the value of that reasonable price. If so, Kirk would be entitled to the same pay that Ruth received for the same work. He would also be entitled to additional pay for the extra services that he performed with respect to the pool. (Once again, if Kirk could not establish a contract with the Van de Laer's, he could alternatively claim restitutionary relief under an action for unjust enrichment.)

CASE BRIEFS

Jedfro Investments (USA) Ltd v Jacyk Estate (2007) 289 DLR (4th) 385 (SCC)—note 1
Three parties, including the plaintiff and the defendant, entered into a joint venture with the intention of purchasing and developing land in Colorado. Part of the purchase price was secured by note and a trust deed in favour of the lender. (The security arrangement worked much like a mortgage.) The venture turned out to be less attractive than hoped and the parties to the joint venture defaulted on the loan. The lender threatened to exercise its security. Because the parties to the joint venture could not work out a rescue plan, the defendant (as one of the parties to the joint venture) purchased the security arrangement from the lender. In effect, the defendant thereby became the joint venture's creditor. The defendant then threatened to exercise the security and foreclose, in which case the plaintiff (as another party to the joint venture) would lose its investment of \$1 400 000. The plaintiff did not take the threat seriously and therefore was surprised when foreclosure actually occurred.

In a subsequent claim for relief, it became necessary for the courts to determine whether the original joint venture agreement remained in force. The trial judge held (and the Ontario Court of Appeal agreed) that the parties' contract was terminated because the parties had largely acted as if the agreement did not exist. The Supreme Court of Canada, however, held that the agreement continued to exist because the parties had never positively invoked one of the various means of bringing a contract to an end.

The plaintiff argued that, by foreclosing on the loan, the defendant was unjustly enriched. The Supreme Court of Canada agreed that there was an enrichment (*ie* the defendant received the full value of the mortgaged property) and a deprivation (*ie* the plaintiff lost its investment of \$1 400 000), but held that there was not an absence of juristic reason for that transfer of wealth. The enrichment was legally explained by the terms of the persisting joint venture agreement and the fact that the defendant had validly purchased the security device.

Hamilton v Open Window Bakery Ltd (2004) 235 DLR (4th) 193 (SCC)—note 2
The parties' contract appointed the plaintiff to act as the defendant's exclusive marketing agent. The contract was to run for 36 months. The agreement, however, also provided for two means by which the contract might be terminated earlier. (1) The plaintiff agent might be terminated at any time, without notice, for committing acts that were detrimental to the company. (2) The company had an unconditional right to terminate the contract, on three months' notice, any time after 18 months' service by the plaintiff.

After 16 months, the defendant company purported to terminate the contract on the grounds of the plaintiff's misconduct. The defendant ultimately was unable to sustain its

allegations of impropriety. The plaintiff therefore claimed damages on the basis that the defendant had improperly terminated the contract prematurely. The trial judge allowed that claim. In calculating damages, the judge found that, but for the defendant's breach, the contract probably would have been terminated after 21 months. The plaintiff accordingly was awarded damages reflecting a 5-month period.

The Supreme Court of Canada held that the trial judge erred in law. The contract gave the defendant the unfettered option to terminate the contract after 18 months. Damages therefore were properly calculated on the basis of the 2-month period representing the *early* termination of the plaintiff's services. The case stands for the proposition that a party is entitled to perform a contract in the least burdensome means possible, while still honouring the terms of the agreement.

H Dakin & Co Ltd v Lee [1916] 1 KB 566 (CA)—note 16

The plaintiff builders agreed to repair the defendant's house according to certain specifications. The plaintiffs completed the project and demanded payment of £1500. The defendant refused to pay anything, however, because the plaintiff's work did not entirely satisfy certain specifications. Those deviations were of an insignificant nature and could have been remedied at a cost of £80. The court held that the plaintiff was entitled to payment under the contract, but subject to a counterclaim by the defendant for the deviations from the specifications.

Kemp v McWilliams (1978) 87 DLR (3d) 544 (Sask CA)—note 17

The plaintiff agreed to paint the defendant's house for \$550. The defendant gratuitously paid \$40 in advance. The plaintiff completed 75 per cent of the job, but could not afford supplies to complete the project. He asked the defendant for a further advance, but she refused, as she was entitled to do. The defendant then paid a non-professional \$335 to complete the job. The high price was due to (1) the fact that the house required more paint than anticipated, and (2) the fact that the non-professional did not work efficiently.

The plaintiff sued for the value of his services. The trial judge awarded \$375 and dismissed the defendant's counterclaim for \$335. The Court of Appeal affirmed. It held that the plaintiff had "substantially performed" the agreement. It is, however, doubtful that 75 per cent completion constitutes substantial performance as that doctrine usually is interpreted. The court held that the plaintiff alternatively was entitled to the same amount on the basis of a claim in unjust enrichment.

Sumpter v Hedges [1898] 1 QB 673 (CA)—note 19 and note 20

Plaintiff agreed to build two houses and stables for £565. The plaintiff partially performed to a value of £333, but then ran out of money and was forced to abandon the project. When he did so, he left materials behind on the worksite. The defendant subsequently used those materials to complete the project himself.

The plaintiff sued for the value of (1) his labour, and (2) the goods left behind. The claim for services rendered was rejected on the ground that the defendant had contracted for *completed* structures. He did not ask for partially completed structures. At the same time,

however, he had no choice but to accept the results of the plaintiff's efforts. It would not have been reasonable to leave buildings half-constructed on his land.

With respect to the claim for the value of the goods left behind, in contrast, the court imposed liability. The crucial fact was that the defendant had enjoyed an option as to whether or not he would take a benefit from those materials. By deciding to take the benefit, he was also taken to have exercised a choice to accept financial responsibility for his decision.

Pym v Campbell (1856) 119 ER 903 (KB)—note 22

The plaintiff had an idea for an invention. The defendant agreed to purchase a share of that invention, but only if it was approved by two named engineers. One of the engineers gave his approval, but the other did not. The plaintiff nevertheless claimed that the defendant was required to proceed with the anticipated purchase. The court disagreed. It held that the approval of both engineers was a condition precedent to the creation of an enforceable contract. Since that approval had not been given, the plaintiff and the defendant never had a contract.

Wiebe v Bobsein [1986] 1 WWR 270 (BC CA)—note 23

The parties entered into an agreement on June 22 under which the plaintiff agreed to purchase the defendant's house. The date for completion of the deal was August 29. However, the agreement also said that the sale was "subject to" the plaintiff selling his current house by August 18. The agreement also allowed the defendant to sell the property to a third party, even before August 29, so long as he gave the plaintiff an opportunity to purchase the property on 72 hours' notice. On July 22, the defendant gave notice that he did not intend to proceed with the sale. The plaintiff did not accept that position and continued to try to sell his own house. He did so on August 18. He then insisted that the defendant was required to proceed with the sale as originally contemplated. The defendant refused to do so.

The court agreed with the plaintiff. The effect of the conditions was said to depend upon the parties' objective intentions. There were two possibilities. First, the parties may have intended that the sale was conditional in the sense that the sales contract did not really arise unless and until the plaintiff sold his current house. If that was true, then the defendant would be entitled to withdraw on July 22, because at that point, there was no binding agreement. The court rejected that view and favoured the second possibility. It held that the sales contract was conditional only in the sense that neither party was required to perform the primary obligations under the agreement unless and until the plaintiff sold his current house by August 18. On that view, there was a "true condition precedent" that did not postpone the *creation* of a contract, but rather the performance of a contract that was created at the outset. And since that was true, the defendant was not entitled, on July 22, to withdraw from the arrangement. Because of the existence of a contract, the plaintiff could prevent him from doing so. Moreover, because the plaintiff satisfied the condition by selling his current house by August 18, both parties became liable to perform their primary obligations: the plaintiff had to pay the purchase price and the defendant had to transfer title to the house.

The court also said that while the effect of a condition in a sales contract is a function of the parties' objective intentions, there was a presumption in favour of a "true condition precedent" that allowed for the immediate creation of a contract and only suspended performance of the primary obligations.

Dynamic Transport Ltd v OK Detailing Ltd (1978) 85 DLR (3d) 19 (SCC)—note 24

The parties entered into an agreement for the purchase and sale of the defendant's land for \$53 000. Although the agreement did not say so, that sale was, as a matter of law, subject to provincial subdivision approval. The agreement also failed to stipulate which party was responsible for seeking that approval. Neither party sought approval, which consequently was not awarded. The defendant then purported to withdraw from the arrangement, while the plaintiff insisted on specific performance or damages in lieu. The debate essentially arose from the fact that, subsequent to the creation of the agreement, the value of the land increased from \$53 000 to \$200 000.

The court held that the sales contract was subject to a "true condition precedent." As a result, a contract was created immediately between the parties, but the performance of the primary obligations was suspended until such time as subdivision approval was granted by the province. Since such approval was never granted, the contract could not be enforced directly. However, the court also said that while neither party was required to immediately perform the *primary* obligations under the agreement, the defendant was required to immediately perform a *subsidiary* obligation – it was required to use reasonable efforts to obtain subdivision approval from the province. Although the agreement did not address that issue, the court found that the secondary obligation arose upon the defendant as a matter of practical necessity. The sale could not proceed without approval and, under the governing statute, approval could only be sought by the current landowner – *ie* the defendant.

The court therefore gave the plaintiff specific performance against the defendant, not of the primary obligation to complete the sale, but rather of the subsidiary obligation to seek subdivision approval. The court also said that if the defendant refused to do so, it would be held liable for the full market value of the property. As previously discussed under Additional Teaching Suggestions, that measure of relief is problematic.

National Trust Co v Mead (1990) 71 DLR (4th) 488 (SCC)—note 26

Remai Corp borrowed money from National Trust. As security for that loan, Remai gave a mortgage over a condominium unit that it was building. Mead later purchased the condominium unit from Remai. As part of that transaction, Mead executed an assumption of liability agreement in favour of National Trust. The mortgage then fell into arrears and National Trust sued both Remai and Mead. One of the questions that arose was whether there had been a novation of the original mortgage, such that the agreement between Remai and National Trust had been discharged and another contract between Mead and National Trust substituted on the same terms. The Supreme Court of Canada answered in the negative. There had not been a novation. Although Mead assumed responsibility for the debt originally existing between Remai and National Trust alone, National trust did

not release Remai and accept Mead in Remai's place. That is because Mead's assumption of the debt was not accepted by National Trust in full consideration and substitution of Remai's obligation. Consequently, both Remai and Mead were potentially liable to National Trust.

Bowes v Shand (1877) 2 App Cas 455 (HL)—note 30

The defendant agreed to purchase 300 tons of rice from the plaintiff. Under their contract, the rice was to be shipped from Madras in "March and/or April." In fact, the rice was shipped in February. The defendant said that it was entitled to reject the rice on the basis that it was not sent according to the terms of the contract – it was shipped too early. The court agreed. Although seemingly harsh, the decision may be justified on the basis that the purchaser often must know, for insurance purposes, when goods will be shipped. It does not want to be put in a position of arranging insurance for "March and/or April," only to later learn that the goods were shipped and damaged in February.

Re Moore & Co and Landauer & Co [1921] 2 KB 519 (CA)—note 34

The vendors agreed to deliver 3000 tins of canned fruit in 100 cartons containing 30 tins each. The vendor delivered the correct number of tins. A problem arose, however, because while half of the shipment consisted of cartons containing 30 tins each, the remainder consisted of cartons containing 24 tins each.

The umpire found that the discrepancy in terms of tins per carton did not affect the market value of the goods, and consequently held that the vendor had properly tendered performance. The Court of Appeal, however, held that the vendor breached the contract and that the buyer was entitled to reject the entire delivery.

Re L Sutro & Co and Heilbut Symons & Co [1917] 2 KB 348 (CA)—note 35

A contract of carriage called for goods to be shipped, entirely by sea, from Singapore to New York. The seller instead took the goods by sea to Seattle, and then by train to New York. The seller defended the deviation on the grounds that the outbreak of the Great War (1) made the contemplated voyage difficult, and (2) created a practice under which goods sent from the Orient to the American eastern seaboard were taken by ship to the American Pacific coast and then eastward by train.

Although an arbitrator accepted the seller's explanation, the Court of Appeal held that (1) the seller was guilty of deviation, and (2) the arbitrator's decision was irreconcilable with the terms of the contract. The buyer consequently was entitled to reject delivery of the goods.

California Prune and Apricot Growers Inc v Baird and Peters [1926] 1 DLR 314 (SCC)—note 36

The vendor was obligated to deliver prunes from Chicago to St John, New Brunswick. The buyer stipulated that the goods should be taken by Canadian National Railway. In fact, the vendor sent the prunes by means of the Canadian Pacific Railway. When the shipment arrived in St John, the buyer rejected delivery on the ground of deviation. That

decision was motivated by the fact that the market value of prunes had fallen in the interim.

The Supreme Court of Canada followed the decision in *Re L Sutro & Co and Heilbut Symons & Co* and held that the deviation was substantial and that the buyer consequently was justified in refusing to accept delivery.

Howard v Pickford Tool Co [1951] 1 KB 417 (CA)—note 37

The defendant employed the plaintiff as a joint managing director. The relationship was an unhappy one and there was friction between the parties. Although he was dissatisfied with his working conditions, the plaintiff continued on with his position, but brought an action for a declaration that the defendant had repudiated the employment agreement. The court refused that declaration. “An unaccepted repudiation is like a thing writ in water and of no value to anybody.” Since the plaintiff had continued to perform under the contract, the defendant’s purported repudiation was irrelevant and of no effect.